

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

TYCO INTERNATIONAL LTD. and
TYCO INTERNATIONAL (US) INC.,

Plaintiffs/Counterclaim Defendants,

v.

L. DENNIS KOZLOWSKI,

Defendant/Counterclaim Plaintiff.

Civil Action No. 02-cv-7317 (TPG)

**TYCO'S MOTION *IN LIMINE* NUMBER 7 REGARDING TYCO'S
ALLEGED RATIFICATION OF THE WALSH PAYMENT**

Plaintiffs Tyco International Ltd. and Tyco International (US) Inc. (collectively "Tyco") move *in limine* for an order precluding Defendant L. Dennis Kozlowski from offering testimony (through direct or cross examination), evidence, or argument that Tyco's Board of Directors ratified the \$20 million fee paid to Frank Walsh, Jr. ("Walsh").

ARGUMENT

Tyco expects that Kozlowski will argue that the Tyco Board of Directors retroactively ratified the \$20 million fee Kozlowski paid to Walsh. For example, Kozlowski has designated testimony related to the Board's January 2002 discussion of the Walsh fee and the Board's decision to disclose that fee in a proxy statement to its shareholders. (*See, e.g.*, Kozlowski Crim. Tr. (4/27/2005) at 12200:11 – 12201:25; 12209:11 – 12212:2)

In rejecting the very argument that it appears Kozlowski intends to make at trial, the Second Circuit held that Tyco's Board of Directors lacked the authority to ratify a director's breach of fiduciary duties as a matter of law. *Tyco Int'l, Ltd. v. Walsh*, 455 F. App'x 55, 57 (2d Cir. 2012) (Summary Order) ("Assuming for the sake of argument that such breaches can be

ratified at all ... only Tyco's shareholders would have been authorized to ratify Walsh's breach, and they did not do so."). Furthermore, the Second Circuit held that Tyco's Board could not retroactively authorize an unauthorized payment constituting a breach of fiduciary duty. *Id.* ("[O]nce a breach has occurred, ... only a decision of the shareholders in general meeting can effect a release.").

Because Tyco's Board is legally incapable of retroactively ratifying the payment to Walsh, and it is undisputed that Tyco's shareholders did not ratify the payment, *id.* at 56, any argument that Tyco ratified the \$20 million fee paid to Walsh is foreclosed as a matter of law. All argument, testimony, or evidence related to that argument should be excluded as irrelevant and unfairly prejudicial and confusing under Rules 402 and 403 of the Federal Rules of Evidence.

CONCLUSION

For the foregoing reasons, Tyco requests that the Court prevent Kozlowski from offering testimony, evidence or, argument that Tyco's Board of Directors ratified the \$20 million fee paid to Walsh.

Dated: July 27, 2012

Respectfully submitted,

TYCO INTERNATIONAL LTD. and TYCO
INTERNATIONAL (US) INC.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2012, I electronically filed the foregoing Tyco's Motion *in Limine* Number 7 Regarding Tyco's Alleged Ratification of the Walsh Payment with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

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